

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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WILLIAM L. SNYDER and NORMA M.  
FELDMAN-SNYDER,

Plaintiffs,

v.

U.S. BANK, N.A. and  
OCWEN LOAN SERVICING, LLC,

Defendants.

Case No. 2:14-cv-01697-MMD-PAL

ORDER

(Defendants' Motion to Dismiss  
— dkt. no. 8)

**I. SUMMARY**

Before the Court is Defendants U.S. Bank National Association, as Trustee for Structured Asset Investment Loan Trust, Mortgage Pass-Through Certificates, Series 2004-8 ("U.S. Bank"), and Ocwen Loan Servicing, LLC's ("Ocwen") Motion to Dismiss ("Motion"). (Dkt. no. 8.) or the reasons discussed below, the Motion is granted.

**II. BACKGROUND**

The following facts are taken primarily from the Complaint. On April 30, 2004, Plaintiff Norma M. Feldman-Snyder purchased real property located at 2336 Danville Court in Henderson, Nevada for \$238,000.00. Plaintiff executed a promissory note ("Note") secured by a deed of trust ("Deed of Trust").<sup>1</sup> (Dkt. no. 1 at 9.) On or about the third quarter of 2012, Plaintiffs William L. Snyder and Norma M. Feldman-Snyder

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<sup>1</sup>The Court takes judicial notice of the following documents in Defendants' Request for Judicial Notice (dkt. no. 9): (1) a Note and a Deed of Trust executed by Norma M. Feldman; and (2) two Assignments of the Deed of Trust to U.S. Bank. The documents are public records and Plaintiffs neither contest their authenticity, nor oppose the request. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (explaining that under Fed. R. Evid. 201 a court may judicially notice matters of public record unless the matter is a fact subject to reasonable dispute).

1 (“Plaintiffs”) were “upside down” in the home and contacted the loan servicer, Homeward  
 2 Residential, Inc., to obtain assistance with the mortgage loan. (*Id.*) A loss mitigation  
 3 agent informed Plaintiffs that they had to fall behind on their mortgage payments in order  
 4 to qualify for assistance. (*Id.*) Plaintiffs stopped making mortgage payments. (*Id.*)  
 5 However, Homeward Residential, Inc. never assisted Plaintiffs. (*Id.*)

6 Two corporate assignments of the Deed of Trust to U.S. Bank were recorded on  
 7 April 29, 2013 and June 3, 2013. (Dkt. No. 9-3.) In addition, on March 1, 2013, the  
 8 servicing of the Note was transferred from Homeward Residential, Inc. to Ocwen. (Dkt.  
 9 no. 1 at 10.) After receiving notice of the servicing transfer, Plaintiffs contacted Ocwen’s  
 10 loss mitigation department to obtain assistance with the mortgage loan. (*Id.*) Plaintiffs  
 11 answered all of Ocwen’s requests and sent them all required paperwork. (*Id.*) In July  
 12 2014, Ocwen’s loss mitigation agent informed Plaintiffs that they reached an agreement.  
 13 (*Id.*) However, Plaintiffs assert that this “‘agreement’” or ‘[o]ffer’ never actually  
 14 materialized.” (*Id.*) Ocwen then informed Plaintiffs that Defendants were moving  
 15 towards foreclosure. (*Id.*)

16 Plaintiffs filed the instant action on September 25, 2014, in the Eighth Judicial  
 17 District Court in Clark County, Nevada, naming U.S. Bank and Ocwen as Defendants.  
 18 (*Id.* at 8-13.) Defendants removed this action on October 15, 2014. (Dkt. no. 1.)  
 19 Defendants now collectively move for dismissal.

20 Although the Complaint does not label a cause of action, the Court construes it to  
 21 allege a single claim for fraudulent misrepresentation arising from Plaintiffs’ endeavor to  
 22 obtain a modification of the mortgage loan from Defendants.<sup>2</sup>

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24 <sup>2</sup>The Complaint contains allegations relating to the “securitization” of the Note and  
 25 “games of ‘hide the beneficiary’ and ‘rotate the servicers.’” (Dkt. no. 1 at 10-11.) To the  
 26 extent Plaintiffs are asserting a claim for fraudulent misrepresentation based on theories  
 27 relating to the securitization of the mortgage loan, Plaintiffs are legally foreclosed from  
 28 advancing such a claim, as these theories fail as a matter of law. *See Feldman-Snyder*  
*v. Leman Bros. Holdings Inc.*, No. 2:13-CV-00445-MMD-VCF, 2013 WL 4520529 (D.  
 Nev. Aug. 23, 2013) (rejecting Plaintiff Norma Feldman-Snyder’s fraudulent  
 misrepresentation claim involving the same mortgage loan to the extent she based the  
 claim on theories relating to the securitization of the mortgage loan).

### 1      **III.      LEGAL STANDARD**

2            A court may dismiss a plaintiff's complaint for "failure to state a claim upon which  
3 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must  
4 provide "a short and plain statement of the claim showing that the pleader is entitled to  
5 relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).  
6 The Rule 8 notice pleading standard requires Plaintiff to "give the defendant fair notice of  
7 what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555  
8 (internal quotation marks and citation omitted). While Rule 8 does not require detailed  
9 factual allegations, it demands more than "labels and conclusions" or a "formulaic  
10 recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
11 (2009) (*quoting Twombly*, 550 U.S. at 555). "Factual allegations must be enough to rise  
12 above the speculative level." *Twombly*, 550 U.S. at 555. Thus, to survive a motion to  
13 dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that  
14 is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

15            In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to  
16 apply when considering motions to dismiss. First, a district court must accept as true all  
17 well-pleaded factual allegations in the complaint; however, legal conclusions are not  
18 entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements  
19 of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.  
20 Second, a district court must consider whether the factual allegations in the complaint  
21 allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the  
22 plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that  
23 the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does  
24 not permit the court to infer more than the mere possibility of misconduct, the complaint  
25 has "alleged — but not shown — that the pleader is entitled to relief." *Id.* at 679 (internal  
26 quotation marks omitted). When the claims in a complaint have not crossed the line from  
27 conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570. A  
28 complaint must contain either direct or inferential allegations concerning "all the material

elements necessary to sustain recovery under *some* viable legal theory.” *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)).

#### IV. DISCUSSION

##### A. Standing

Defendants assert that Plaintiffs do not have standing to bring this lawsuit. A party seeking to invoke the jurisdiction of the federal courts must “satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.” *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (citation and internal quotation marks omitted). To satisfy Article III’s standing requirements, the plaintiff must show (1) she has “suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (citation and internal quotation marks omitted).

Lack of standing based on Article III requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). *Id.* However, Defendants have improperly raised the constitutional standing argument under Federal Rule of Civil Procedure 12(b)(6). Therefore, the Court will deny the argument at this time.

Moreover, given that the Complaint is not entirely clear and, as explained below, Plaintiffs have failed to state a claim, the Court will allow Plaintiffs leave to amend the Complaint to more clearly articulate their standing. *Id.* (explaining a court may allow a plaintiff leave to amend the complaint to state “further particularized allegations of fact deemed supportive of plaintiff’s standing”) (citation omitted).

##### B. Fraudulent Misrepresentation

To state a claim for fraudulent misrepresentation, a plaintiff must allege five elements: (1) the defendant made a false representation; (2) the defendant knew or believed the representation was false; (3) the defendant intended to induce the plaintiff to act or to refrain from acting in reliance on the misrepresentation; (4) the plaintiff

1 justifiably relied on the misrepresentation; and (5) the plaintiff suffered damages from the  
2 reliance. *Bulbman, Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992).

3 Rule 9(b) of the Federal Rules of Civil Procedure requires that “[i]n alleging fraud  
4 or mistake, a party must state with particularity the circumstances constituting fraud or  
5 mistake.” Fed. R. Civ. P. 9(b). To satisfy this standard, a plaintiff must plead “an account  
6 of the ‘time, place, and specific content of the false representations as well as the  
7 identities of the parties to the misrepresentations.’”<sup>3</sup> *Swartz v. KPMG LLP*, 476 F.3d 756,  
8 764 (9th Cir. 2007) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.  
9 2004)). Rather than only identifying the transaction, the complaint must also “set forth  
10 what is false or misleading about a statement, and why it is false.” *Vess*, 317 F.3d at  
11 1106 (citation and internal quotation marks omitted). Furthermore, when a fraud suit  
12 involves multiple defendants “[r]ule 9(b) does not allow a complaint to merely lump [the]  
13 defendants together but requires plaintiffs to differentiate their allegations . . . and inform  
14 each defendant separately of the allegations surrounding his alleged participation in the  
15 fraud.” *Swartz*, 476 F.3d at 764-65 (internal quotation marks and alterations omitted).

16 Here, Plaintiffs have not adequately pleaded fraud with requisite particularity. An  
17 obvious deficiency of the Complaint is Plaintiffs’ lumping of both Defendants together.  
18 Plaintiffs do not separately notify U.S. Bank and Ocwen of their respective roles in the  
19 fraud. Plaintiffs also fail to sufficiently plead the elements of their claim. Specifically,  
20 Plaintiffs do not identify the content of each Defendant’s representations, what is false or  
21 misleading about the statements, when they were made, and who made them. Plaintiffs  
22 also do not allege that each Defendant knew the representations were false. Finally,  
23 Plaintiffs fail to show that they justifiably relied on each Defendant’s false representations  
24 or that they suffered damages as a result of their reliance. Thus, Plaintiffs have failed to  
25 state a claim upon which relief can be granted.

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27 <sup>3</sup>This is also described as “the who, what, when, where, and how of the  
28 misconduct charged.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.  
2003) (citation and internal quotation marks omitted).

1 In the Complaint, Plaintiffs refer to the Nevada Supreme Court's decision in  
 2 *Rocker v. KMPG, LLP*, to argue that a relaxed pleading standard should apply to this  
 3 case. 148 P.3d 703 (Nev. 2006) (overturned on other grounds by *Buzz Stew, LLC v. City*  
 4 *of N. Las Vegas*, 181 P.3d 670, 672 (Nev. 2008)). Under *Rocker*, where the facts  
 5 necessary for pleading with particularity "are peculiarly within the defendant's knowledge  
 6 or are readily obtainable by him," the court may apply a relaxed pleading standard. *Id.* at  
 7 708 (quoting *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993)). In such a situation,  
 8 the court may permit the plaintiff to conduct limited discovery such that an amended  
 9 complaint pleading fraud with particularity may be filed. *Id.* at 709. However, before  
 10 *Rocker* discovery may be permitted, the plaintiff must: (1) plead sufficient facts to  
 11 support a strong inference of fraud; (2) aver that a relaxed pleading standard is  
 12 appropriate; and (3) show in the complaint that the claim cannot be pleaded with more  
 13 particularity because the necessary information is in the defendant's possession. *Id.*

14 Plaintiffs have not demonstrated that a relaxed pleading standard should apply to  
 15 this case. Not only do Plaintiffs fail to identify any false representations to support a  
 16 strong inference of fraud, but they also fail to explain why the information necessary for  
 17 them to comply with Rule 9(b) is within Defendants' knowledge or possession. Instead,  
 18 the Complaint describes Plaintiffs' interactions with Defendants regarding the loan  
 19 modification for at least one year, including sending Defendants all of the paperwork  
 20 they requested and reaching an "agreement" with Ocwen's agent. (Dkt. no. 1 at 10.)  
 21 Because Plaintiffs were actively involved in the loan modification process, they should  
 22 have sufficient knowledge of the relevant facts necessary to support their claim. Thus,  
 23 *Rocker's* relaxed pleading standard does not apply.<sup>4</sup>

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26 <sup>4</sup>Plaintiffs' Complaint also does not meet the Ninth Circuit's criteria, which applies  
 27 a relaxed pleading standard to "permit discovery in a limited class of corporate fraud  
 28 cases where the evidence of fraud is within a defendant's exclusive possession." *U.S.*  
*Ex. Rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (citation  
 omitted).


1 Accordingly, the Court will grant Defendants' Motion. However, because the Court  
2 cannot find that amendment would be futile, the Court will grant leave to amend. Fed. R.  
3 Civ. P. 15(a); *Forman v. Davis*, 371 U.S. 178, 182 (1962).

4 **V. CONCLUSION**

5 The Court notes that the parties made several arguments and cited to several  
6 cases not discussed above. The Court has reviewed these arguments and cases and  
7 determines they did not warrant discussion as they do not affect the outcome of the  
8 Motion at this time.

9 It is therefore ordered that Defendant's Motion to Dismiss (dkt. no. 8) is granted.  
10 Plaintiffs may file an amended complaint within fifteen (15) days to assert a fraudulent  
11 misrepresentation claim to the extent that Plaintiffs are able to allege sufficient facts to  
12 cure the deficiencies identified in this Order. Failure to file an amended complaint will  
13 result in dismissal of Plaintiffs' claim with prejudice.

14 DATED THIS 27<sup>th</sup> day of May 2015.

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17 MIRANDA M. DU  
18 UNITED STATES DISTRICT JUDGE  
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